IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 4103 OF 2005
IN
SUIT NO.3492 OF 2005

Sanjay Agarwal]
s/o. late Shri K. L. Agarwal]
adult, Indian Inhabitant,]
having address at 117/K/20]
Sarvodaya Nagar, Kanpur 208 025]
Uttar Pradesh, now at Mumbai]..Plaintiff

versus

1. Messrs. Beekalane Fabrics]
(P) Ltd., a Private Limited]
Company, incorporated under]
Companies Act, 1956, having]
registered office address at]
Beekalene House, 47, Central]
Road, MIDC, Andheri (East)]
Mumbai 400 093]
2. Rajan Sehgal]
adult, aged about 36 years]
Indian Inhabitant of Bombay,]
Managing Director of the]
Defendant No.1, Messrs.]
Beekalene Fabrics (P) Ltd.,]
having office address at]
Beekalene House, 47, Central]
Road, MIDC, Andheri (East)]
Mumbai 400 093]..Defendants

Mr. A. V. Sakhare, Sr. Counsel with Mr. Bharat Vaishnawa i/b. M/s. Bharat Vaishnawa & Co. for the Plaintiff.

Mr. Sandip Parekh with Ms. Raji Radhakrishnan i/b. India Law Alliance for the Defendants.

CORAM : S. J. VAZIFDAR, J.
DATE : 13TH SEPTEMBER, 2007

ORAL JUDGMENT :

1. The suit is filed for specific performance of a MOU / Agreement dated 14.2.2005 entered into between the Plaintiff and the Defendants. The Notice of motion is for the usual reliefs for the appointment of a Court Receiver and injunction in a suit for specific performance.

2. Defendant No.2 is the Managing Director of Defendant No.1. By the said MOU, the first Defendants agreed to transfer / sell to the Plaintiff the leasehold plot admeasuring 6150 sq. meters at the Taloja Industrial Area, MIDC, Tal: Panvel, for a total consideration of Rs.87,00,000/-. Pursuant to clause 2 of the Agreement, part payment of Rs.21,75,000/- was made on the signing of the said Agreement. Under clause 9 of the Agreement, the balance amount was payable on or before registration of the documents and possession being handed over by the Defendants to the Plaintiff.

3. The execution of the Agreement is admitted. The receipt of the part payment of Rs.21,75,000/- is admitted. The Plaintiff by his letter dated 12.10.2005 stated the above facts and that despite repeated requests, the Defendants had failed to do

all things necessary for implementation of the said agreement.

4. The Defendants by a letter dated 29.11.2005 alleged that they had earlier addressed a letter dated 26.10.2005 in reply to the Plaintiff's said letter dated 12.10.2005 and enclosed a copy therewith.

5. The Plaintiff has denied the receipt of the letter dated 26.10.2005. The letter was allegedly sent Under Postal Certificate (UCP). I will for the moment not refer to the reservations expressed by the Apex Court and by this court regarding the evidentiary value of 'under postal certificate' receipts issued by the postal authorities. It is pertinent to note that even in the alleged letter dated 26.10.2005 and in the said letter dated 29.11.2005 there is no reference to any other letters. The importance of this is that now in the Affidavit in Reply five alleged letters are referred to which I shall deal with, shortly.

6. In the alleged letter dated 26.10.2005 the Defendants stated that the Plaintiff wanted the

advance money back and was trying to cancel the deal whereas the Defendants were always ready and willing to comply with their part of the agreement. The Defendants further stated that as they could not wait indefinitely they were terminating the agreement and forfeiting the money. However, the Defendants offered to refund the part payment without prejudice.

7. The Defendants have relied upon four letters allegedly also sent under postal certificate. I will presume that these letters were in fact addressed by Defendants. The letters however do not advance the Defendants case at all. In fact the letters militate against the contentions raised in the Defendants letter dated 26.10.2005.

8. By an alleged letter dated 15.3.2005 Defendant No.2, the Managing Director of Defendant No.1 alleged that the Plaintiff had not responded to his telephone calls. It is important to note that Defendant No.2 stated that he was willing to sign all the documents but that the Plaintiff should bring the same. This indicates that at this stage the Defendant had kept the agreement alive and in

fact wanted the performance thereof.

9. By an alleged letter dated 26.4.2005, Defendant No.2 expressed reservations about the estate agent doing the work expeditiously. The Defendants in fact stated that they could permit the Plaintiff to construct on the plot immediately after they cleared the dues and took vacant possession. The Defendants requested the Plaintiff not to neglect the matter as they were in urgent need of funds.

. Here again therefore the Defendants had kept the agreement alive.

10. By an alleged letter dated 25.5.2005 the Defendants regretted that the Plaintiff had not responded to their messages and alleged that the Plaintiff had promised to clear the dues within three months. The Defendants requested the Plaintiff to make payment.

. Once again therefore till that stage the agreement had been kept alive.

11. By an alleged letter dated 18.6.2005 the Defendants alleged that the Plaintiff was not serious in the matter from the beginning and that they were not interested in going ahead with the Agreement.

12. It is important to note that the aforesaid letters were not even referred to in the letter dated 29.11.2005. Considering the nature of the letters if they had been actually sent they would certainly have been referred to in the letter dated 29.11.2005. Prima-facie, at least it is difficult therefore to accept that the Defendants had in fact addressed the said letters. Even assuming the letters were sent they do not establish the Defendants case.

13. The Defendants contended in the letters that the Plaintiff had failed to perform the agreement and it was as a result thereof that they were compelled to terminate the same.

14. It is however not clear as to how Defendants intended performing the agreement. From the documents on record there is nothing to show any

want of diligence on the Plaintiff's part. As noted above, the Plaintiffs obligation to pay the balance amount was only upon being put in possession and upon registration of the agreement.

15. It was then contended that the agreement does not constitute a contract and is merely an agreement to enter into an agreement. I am unable to agree. All the essential terms and conditions of the agreement are contained in the said MOU. This was never the Defendants case either. In fact even the alleged letters indicate that Defendants themselves considered the contract as concluded. They never alleged that there was any other term, much less an essential term, which was not agreed upon.

16. Finally, it was submitted that any order in favour of the Plaintiff must as a matter of law, also require the Plaintiff to deposit the balance consideration. I am unable to agree.

17. In a suit for specific performance, the Plaintiff is essentially required to establish that there is a valid and subsisting contract and that

the Plaintiff is and always was ready and willing to perform all the essential terms and conditions of the contract as per its true construction. There is neither any precedent nor principle which mandates or even warrants that an interlocutory order in a specific performance suit must require the Plaintiff to deposit the balance consideration. Indeed, such an absolute proposition would be grossly unfair and would cause great injustice to a Plaintiff in a suit for specific performance who has a good case on merits.

. Take for instance the present case where I have come to a prima-facie conclusion in the Plaintiff's favour on merits. He is required to pay the balance consideration only on or before the registration of the document and possession being handed over. Thus upon payment the Plaintiff would be entitled to enjoy the benefit of the property as per the agreement. If I were to require him to deposit the balance consideration today without putting him in possession or ordering the documents to be executed by the Defendants and registered. I would in effect be compelling him to fulfill his part of the contract without giving him the benefit

of the performance thereof by the other party, the Defendants. If such a view were to be upheld, the Plaintiff would in effect be required to perform all his obligations without being given the benefit of the agreement. It would penalize an honest Plaintiff and put a premium on the dishonesty of the Defendant. The law does not mandate such an order. Logic far from supports it.

18. It is in the discretion of the court, depending on the facts and circumstances of the case, whether or not to require a Plaintiff to deposit the consideration as a condition of grant of an injunction in a suit for specific performance. As a rule such an order of deposit ought not to be passed where the Court is satisfied with the merits of the Plaintiff’s case and sees no reason to test the bona-fides of the Plaintiff.

. For instance such a course could be resorted to in cases where the Plaintiff is put in possession of and granted the full benefit of the agreement of which specific performance is sought at the interim stage. Even in such a case such an order would not follow as a matter of course, as an inflexible rule.

19. Mr. Parekh relied on an order of a learned Single Judge of this Court **dated 6.11.2006 in Appeal from Order No. 1109 of 2005 (Shri Gaurishankar Govardhandas Todi vs. M/s. Evershine Homes Pvt. Ltd. & Anr.)** and in particular to the following observations in paragraph 4 thereof:-

> "In order to get an injunction, the respondent no. 1 must plead and show that requirements of section 16(c) of the Specific Relief Act) are complied i.e. he is and always was ready and willing to perform his part of the contract i.e. to pay Rs. 9 crores. Learned counsel for the respondent No.1 was unable to point out specific averment made in the plaint about his readiness and willingness to perform his part of the agreement. He however submitted that in the application for interim injunction the respondent no.1 has made an averment of his readiness and willingness and if necessary such an averment would be made in the plaint by an amendment. In order to show his readiness and willingness, respondent no.1 should be required to deposit in this court the entire amount of the consideration. That is also necessary to protect the interest of the appellant against any loss arising out of any fall in the price of the property as well as loss of interest. In my view, the injunction should have been conditional upon such deposit of the amount in the court."

. I do not read the judgment as laying down any general proposition as contended on behalf of the Defendants. The order was passed in the facts

and circumstances of that case. It is pertinent to note that in that case readiness and willingness, the pleading and proof whereof is a mandatory requirement under Section 16(c) of the Specific Relief Act, was not even pleaded in the plaint.

20. Mr. Parekh then relied upon the judgment of another learned Single Judge **dated 1.8.2007 in the case of (Aditya Munim vs. Kavita Sanghi & Ors.). Notice of Motion No. 2494 of 2007 in Suit No. 1870 of 2007**. It is true that in this case the learned Judge did come to the conclusion that the Plaintiff had made out a strong prima-facie case and despite the same ordered as under:

> "To ascertain the bona fide of the Plaintiffs while granting ad-interim relief to the Plaintiff so as to preserve the property till the hearing of the Motion, the Plaintiff can be called upon to deposit the entire sale consideration in this Court including the amounts referred to in Clause (ii) and (iii) of paragraph 3.5 of the Plaint. This course can be adopted in terms of the exposition in decision in Appeal from Order No. 1109 of 2005 dated 6th November, 2006, which decision has been approved by the Apex Court in SLP No. 2049 of 2006 decided on 15th December, 2006." (emphasis supplied)

. The learned Judge has by no means held that

in every case for specific performance where interlocutory reliefs are granted, the court is bound to order the Plaintiff to deposit the entire consideration as a condition precedent. In fact the learned Judge has stated that in such a case the Plaintiff can be called upon to deposit the entire sale consideration. The learned Judge obviously did so "To ascertain the bona-fides of the Plaintiff" therein. In the facts of this case I see no reason to test the bona-fides of the Plaintiff.

21. In the circumstances, the Notice of Motion is made absolute in terms of prayer (b) except the words "dealing with" which are bracketed in red. Further, admittedly the Defendant has not carried on any business on the property for over 20 years. It is stated that an application for reconstruction to MIDC has been made by the Defendants. The Defendants shall therefore not utilise the said plot for any reason without the leave of the court.